SUPREME COURT, U. S.

DEC 6 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 680

WARREN H. BYRD,

Petitioner,

vs.

WARD LANE, Warden of
Indiana State Prison and
DAVID P. MORTON, Superintendent
of Dr. Norman M. Beatty,
Memorial Hospital,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the consent to search obtained from the Petitioner was voluntarily given, based upon the record.
2. Whether a voluntary consent to search may effectively waive Fourth Amendment rights without Petitioner first receiving a Miranda-type warning.

STATEMENT OF THE CASE

The Petitioner, Warren Byrd, was convicted of the crime of first degree murder in the Henry Circuit Court, Henry County Indiana, on June 19, 1961. He was at all times during that trial represented by two attorneys. In his Petition for Writ of Habeas Corpus, in the United States District Court for the Northern District of Indiana, he alleged that he had been denied the effective assistance of counsel. The only question properly before the District Court was whether he had been deprived of his right to counsel under the Sixth and Fourteenth Amendments. There was no Fourth Amendment question squarely before the Court. He argued, however, that the seizure of a bottle of poison from his home and its subsequent introduction into evidence at his trial were the fruits of an unlawful search, and that failure to move to suppress this evidence or to object to its admission in evidence was an example of incompetency of counsel (Pet. for Writ of Habeas Corpus, pp. 7, 8). This was only one of twelve alleged acts of incompetency. In his Petition for Writ of Habeas Corpus, Petitioner stipulated the competency of one of his two trial lawyers (Pet. for Writ of Habeas Corpus, p. 2).

A hearing was held in the District Court on May 12, 1967. At that hearing, a written consent to search his premises, signed by Petitioner, was introduced into evidence (Tr. pp. 122, 154). Three police officers testified that they had observed the Petitioner sign the permission to search the premises and that he had also given his oral permission to search (Tr. pp. 142-180). All three of these police officers stated that the consent had been freely and voluntarily given, and that no promises or threats were used in obtaining it. The Petitioner denied remembering

having signed the permission to search but admitted the signature appeared to be his signature (Tr. pp. 121-122).

In a memorandum opinion dated August 10, 1967, the District Court addressed itself to each and every act of alleged incompetency raised in the Habeas Corpus petition. The Court held, *inter alia,* that the evidence obtained as a result of the search had been properly admissible. The Court concluded that Petitioner had at all times during his trial been represented by not one but two competent attorneys, and denied Petition for the Writ.

In his Brief and Appendix for Plaintiff-Appellant in the Seventh Circuit, Petitioner abandoned his theory of incompetency of counsel and relied solely on the Fourth Amendment question of the validity of the search. On July 25, 1968, the Seventh Circuit Court of Appeals affirmed the order of the District Court. 398 F.2d 750. Major, Senior Circuit Judge, and Fairchild, Circuit Judge, held that the Petitioner voluntarily consented to the search. Kiley, Circuit Judge, dissented.

REASON FOR DENYING THE WRIT

Petitioner has not set forth any grounds under Rule 19 of this Court which would warrant the granting of a Writ of Certiorari to review the decision of the Seventh Circuit Court of Appeals. Further, Petitioner has not shown in his Petition any error in the record of the Court below which would warrant granting the Writ.

I.
THE SEARCH AND RESULTANT SEIZURE WERE BASED UPON A CONSENT FREELY GIVEN

In the opinion of the Seventh Circuit Court below, Major, Senior Circuit Judge, discussed the question of the volun-

tariness of the consent to search. He noted that Judge Grant, in the Northern District Court's memorandum opinion, had specifically found that the consent to search had been voluntarily given:

> "In response to this allegation, the Court in its memorandum opinion stated:
>
> 'Finally, petitioner argues that evidence discovered upon the search of his home by police and admitted or referred to during the trial was not admissible because obtained as a result of an illegal search (Petition at 8). At the hearing held in this Court May 12, 1967, Respondent's Exhibit A was admitted, being petitioner's consent to have his house and residence searched by Warren Davis, Henry County Sheriff, and other officers.'
>
> "It further found:
>
> 'All testified that Byrd signed it in their presence and that it was done voluntarily. All that Byrd could testify to was that he did not remember signing such a form. In light of all the testimony given at that hearing, the Court can only conclude that the evidence obtained as a result of the search was properly admissible.'" *Byrd v. Lane,* 398 F.2d 750, 752 (7 Cir. 1968).

At the evidentiary hearing, the District Court had before it the record of the trial court regarding the evidence obtained as a result of the search. It also had the live testimony of the Petitioner and the testimony of three police officers who were present when the Petitioner gave both his oral and written permission to search. On appeal, the Seventh Circuit had the complete record before it and concluded:

> "We agree with the District Court that Petitioner's consent to search his home was given freely and

> voluntarily, without duress, promise or coercion. In fact, we think the testimony unmistakably discloses that such consent was given both orally and in writing." *Byrd, supra,* p. 753.

The Seventh Circuit stated the general rule on the question of voluntariness:

> "It has been often held that whether a consent to search is voluntary is a question for a trier of facts and its findings, if substantially supported, will not be disturbed on review. *Drummond v. United States,* 8 Cir., 355 F.2d 983, 988; *United States v. Thompson,* 2 Cir., 356 F.2d 216, 220, cert. den. 384 U.S. 964, 86 S. Ct. 5091, 16 L.Ed. 2d 675, and *Ruud v. United States,* 9 Cir., 347 F.2d 321, 322." *Byrd, supra,* p. 752.

In concurring with the opinion of Major, Senior Circuit Judge, Fairchild, Circuit Judge, stated:

> "I concur on the ground that the petitioner voluntarily consented to the search." *Byrd, supra,* p. 755.

Contrary to the allegations of Petitioner herein, the record clearly supports the findings below that the consent was voluntary.

II.

A MIRANDA-TYPE WARNING WAS NOT NECESSARY FOR A PROPER WAIVER OF FOURTH AMENDMENT RIGHTS

In the Seventh Circuit Court, below, the Petitioner argued that a Fourth Amendment right could not be waived unless a Miranda-type warning were first given. In support of this position, Petitioner relied on language which was purely *obiter dictum* in a Seventh Circuit case:

> "On this appeal the government has not argued that the defendant waived the protection accorded by the Fourth Amendment by consenting to the 9:00 A.M. car search at the police station and the subsequent search at the Mancuso Chevrolet Agency. Since the arrested defendant was then in custody in the Skokie cell block and had not been apprised of his Fourth Amendment rights, the trial court correctly observed that no true consent had been given to Detective Reiter." *United States v. Nikrasch,* 367 F.2d 740, 744 (7 Cir. 1966).

The above language was criticized in the case of *Gorman v. United States,* 380 F.2d 158, 164 (1 Cir. 1967):

> "We cannot accept the recently suggested rule that a specific warning of Fourth Amendment rights is necessary to validate a warrantless search after the suspect has been arrested. United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966); United States v. Blalock, 255 F.Supp. 268 (E.D. Pa. 1966). Contra, State v. McCarty, Kan, 427 P.2d 616 (May 13, 1967). Although the analogy with Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), has a surface plausibility, we do not think that the Miranda prescription, formulated to give threshold warnings of fifth and sixth amendment rights at the earliest critical time in a criminal proceeding, must or ought to be mechanistically duplicated when circumstances indicate the advisibility of requesting a search."

In declining application of *Nikrasch* to the case now at bar, the court stated:

> "While we think our statement in Nikrasch of dubious propriety, we are not disposed to reject it because it was given application to a factual situation at great variance with that here." *Byrd, supra,* p. 755.

Respondents agree that the statement in *Nikrasch* is of dubious propriety. Respondents further agree that it should have no application to the factual situation of the case now at bar. Of even greater importance, however, if the Court feels that the statement in *Nikrasch* is persuasive, it should not be made to apply retrospectively to the case now at bar.

The purpose of the exclusionary rule of evidence was aptly stated in *Elkins v. United States,* 364 U.S. 206, 217 (1960):

> "The same point was made at somewhat greater length in the often quoted words of Professor Wigmore: 'Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but let off somebody else who broke something else.' VIII Wigmore, Evidence (3rd Ed. 1940) Section 2184."

Mapp v. Ohio, 367 U.S. 643 (1961), relied upon heavily below by Petitioner, reiterated the exclusionary rule. However, this court declined giving *Mapp* restrospective application:

> "Mapp had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless

police action. Indeed, all of the cases since Wolf requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. See e.g., Rea v. United States, Supra. We cannot say that this purpose would be advanced by making the rule restrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved." *Linketter v. Walker,* 381 U.S. 618, 636.

Respondents submit that making a Miranda-type warning restrospective to the case at bar would serve absolutely no purpose under the exclusionary rule. Since *Miranda* was held not to have retrospective application (*Johnson v. New Jersey,* 384 U.S. 719 (1966)) it follows that Miranda-type warnings should not be applied retrospectively to Fourth Amendment consent-to-search cases.

CONCLUSION

Petitioner voluntarily consented to the search complained of and a Miranda-type warning was not required for a waiver of Fourth Amendment rights.

WHEREFORE, Respondents prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,
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